In the

Supreme Court of the United States

OCTOBER TERM, 1960

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt, *Petitioner*,
vs.
R. C. GRANQUIST, District Director of the Internal Revenue Service, *Respondent*.

RICHARD D. HARRIS, Trustee for Alaska Telephone Corporation, *Petitioner*,
vs.
UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

STATUTES

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the Court of Appeals' judgments entered February 1, 1961, in both of the above entitled cases, which cases were consolidated for purposes of argument before the United States Court of Appeals for the Ninth Circuit.

CITATIONS TO OPINIONS BELOW

A. *Simonson v. Grandquist:*

In *Simonson v. Granquist,* the Referee's Findings and Conclusions, Referee's Order and Order of the District Court for the District of Oregon are unreported, but are fully set forth in the Transcript of Record (R. 7, 22 and 27). The Court of Appeals' opin-

ion (R. 34-37), Appendix A, *infra*, pp. 12-17, is to date unreported.

B. *Harris v. United States of America:*

In *Harris v. United States of America*, the Referee's Opinion, Findings of Fact and Conclusions of Law, and Order Determining Liability for Taxes of the United States, and the Order Adopting and Modifying in Part the Order Determining Liability for Taxes of the United States as entered by the District Court for the Western District of Washington are unreported, but are fully set forth in the Transcript of Record (R. 33, 38, 41, 46 and 54). The Court of Appeals' opinion (R. 66), which adopts the reasons set forth in that Court's opinion in *Simonson v. Granquist* (R. 34-37), Appendix A, *infra*, p. 18, is to date unreported.

JURISDICTION

A. *Simonson v. Grandquist:*

The Court of Appeals' judgment in *Simonson v. Granquist* was entered February 1, 1961 (R. 38; Appendix B hereto, *infra*, p. 19). Petition for Rehearing, filed March 2, 1961, was denied March 13, 1961 (R. 38a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and 11 U.S.C. § 47.

B. *Harris v. United States of America:*

The Court of Appeals' judgment in *Harris v. United States of America* was entered February 1, 1961 (R. 67; Appendix B hereto, *infra*, p. 20). Petition for Rehearing, filed March 7, 1961, was denied March 13, 1961 (R. 68). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and 11 U.S.C. § 47.

QUESTIONS PRESENTED FOR REVIEW

A. *Simonson v. Granquist:*

In *Simonson v. Granquist,* the questions presented for review are as follows:

1. Is the trustee in bankruptcy a "judgment creditor" within the purview of Section 6323(a) of the Internal Revenue Code of 1954 so that the United States does not have a valid tax lien as against the trustee in bankruptcy where its tax assessments and the demand for payment are made prior to the filing of the petition in bankruptcy, but notice of the tax lien was not filed until after the petition in bankruptcy had been filed?

2. Is an addition to a federal tax imposed as a penalty by statute, and which became a secured claim against the property of the taxpayer and for which a lien arose in favor of the United States prior to the petition in bankruptcy, properly allowable as a secured claim against the bankrupt's estate, or is such claim disallowed by the operation of Section 57(j) of the Bankruptcy Act, as amended?

B. *Harris v. United States of Amercia:*

In *Harris v. United States of America,* the sole question presented is as follows:

Is an addition to a federal tax imposed as a penalty by statute, and which became a secured claim against the property of the taxpayer and for which a lien arose and notices of lien were filed prior to the filing of a petition in reorganization, properly allowable as a secured claim against the debtor's estate, or is such claim disallowed by the operation of Section 57(j) of the Bankruptcy Act, as amended?

STATUTES INVOLVED

Neither of the cases presented involve any constitutional provisions, treaties, ordinances or regulations.

A. *Simonson v. Granquist:*

In *Simonson v. Granquist,* portions of Sections 6321, 6322, and 6323 of the 1954 Internal Revenue Code, and portions of Sections 1, 2, 57(j), 64, 67, and 70 of the Bankruptcy Act, as amended, are involved. All of the applicable portions thereof, together with citations to the volume and page where they may be found in the official editions, are set forth verbatim in Appendix C, *infra,* pp. 21-28.

B. *Harris v. United States of Amercia:*

In *Harris v. United States of America,* only Sections 57(j) and 67(b) of the Bankruptcy Act, as amended, are involved. They are both set forth verbatim, together with citations to the volume and page where they may be found in the official editions, in Appendix C, *infra,* pp. 22, 23-24.

STATEMENT OF THE CASES

A. *Simonson v. Granquist:*

The following is a statement of the case of *Simonson v. Granquist*:

Upon the trustee's application, the referee ruled upon the allowance of certain secured claims of the United States for penalties and post-bankruptcy interest. The facts are not in dispute and, as found by the referee, may be stated as follows (R. 7-8):

The bankrupt was in the business of a small retail

jeweler, and the trustee was able to realize more than $8,000 upon liquidation of the business assets. This sum was sufficient to pay all tax claims and expenses of administration (R. 7).

The Director of Internal Revenue filed various claims in the bankruptcy proceeding for income, employment and excise taxes accruing prior to bankruptcy and owing by the bankrupt. The trustee paid $4,932.41 of taxes owing but disputed liability for $1,442.41 of penalties and $182.49 of post-bankruptcy interest (R. 6-8).

The taxes and penalties involved were assessed against Druxman on September 6, 1957, and a statement of tax due and demand for payment was issued ten days later. Druxman filed a voluntary petition in bankruptcy on October 18, 1957. The notice of tax lien was filed by the District Director of Internal Revenue on October 31, 1957 (R. 7).

The United States asserted its claim for taxes, penalties and interest as a secured creditor by virtue of its pre-existing lien and not as a priority unsecured creditor (R. 8).

The referee held that the federal tax lien was perfected against the trustee where the tax had been assessed and demand for payment had been made upon the taxpayer prior to bankruptcy although notice of the lien was not filed until after the filing of the petition in bankruptcy (R. 9-11). The referee also held that Section 57(j) of the Bankruptcy Act applies only to unsecured claims and does not disallow the payment of penalties on a tax lien (R. 11-13). Finally, the ref-

eree held that the United States was not entitled to post-bankruptcy interest (R. 13-21).

The trustee petitioned the District Court for review of the referee's order insofar as it allowed the United States penalties included in its claim based on a federal tax lien[1] (R. 28-29). The District Court affirmed the order of the referee (R. 27-28). The trustee then appealed to the United States Court of Appeals for the Ninth Circuit, which Court affirmed the order of the District Court (R. 34-37; Appendix A, *infra*, pp. 13-17). This petition follows.

B. *Harris v. United States of Amercia:*

The following is a statement of the case of *Harris v. United States of America*:

The Alaska Telephone Corporation, the taxpayer and debtor herein, filed a petition for a reorganization under Chapter X of the Bankruptcy Act, as amended, as of September 30, 1955.[2] The filing of this petition was approved by the District Court on November 21, 1955 (R. 33-34).

The United States filed proofs of claims for unpaid taxes with the trustee. Included in its claims and insofar as it is relevant to this proceeding are unpaid

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[1] The United States also petitioned to the District Court for review of the referee's order insofar as it disallowed the payment of post-bankruptcy interest (R. 24-25, 27). The District Court affirmed the referee. The United States did not petition for review of the District Court's order, and this issue is not involved on appeal.

[2] Initially this petition was filed on September 30, 1955, under Chapter XI of the Bankruptcy Act relating to proceedings in arrangements. However, it subsequently was amended to bring the proceedings under Chapter X dealing with corporate reorganizations (R. 30).

F.I.C.A. and telephone and telegraph excise taxes for 1952 and 1953 in the amount of $56,382.93, pre-petition interest in the amount of $1,056.28 and penalties imposed on such unpaid taxes in the amount of $7,714.72, for which the United States obtained liens in 1953 and filed notices of its liens in 1953 and 1954, prior to the time the debtor filed its petition in reorganization. Also, included in its claims are $182.86 of unpaid federal unemployment taxes for which a lien did not arise until 1956 and for which the United States did not seek to obtain interest or penalties[3] (R. 13-20, 39-40).

Prior to the filing of the petition in reorganization the taxpayer submitted an offer in compromise of $40,000 to settle the taxes involved and deposited that amount with the District Director of Internal Revenue between June 7, 1954, and August 19, 1955. Upon the filing of the petition for a reorganization the offer

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[3] The United States filed three proofs of claim for unpaid taxes. Its proof of claim, number 16½, was for $65,559.43, of which $405.50 was abated as being collectible, leaving a net amount of $65,153.93. This claim comprised $56,565.79 of unpaid taxes, $7,714.72 of penalties on the unpaid taxes and $1,056.28 of assessed interest, plus pre-petition interest for which liens arose and notices of liens were filed prior to the reorganization proceedings (R. 17-19). These amounts conform to those found by the referee (R. 39) and confirmed by the District Court (R. 56).

The proof of claim of the United States, number 23, was for $301.73 of unpaid federal unemployment taxes for 1953. The lien for this amount arose after the filing of the petition in reorganization and no penalties or interest were claimed (R. 16). This claim was allowed for $182.86. The amount of $63,336.79, set out in the petition for review to the District Court (R. 9, 52) includes both the $63,153.93 of liened claims covered by claim number 16½ and the $182.86 of unliened claims covered by claim number 23.

The proof of claim of the United States, number 51, was for $807.37 of unpaid withholding taxes for the period ended December 31, 1955, liability for which was incurred by the trustee. This amount was paid in full by the trustee in December, 1957, and is no longer in issue (R. 13, 15).

was withdrawn and the money was returned to the trustee on January 17, 1956 (R. 40).

A plan of reorganization was filed which, as amended, was submitted to the District Court for approval which provided, among other things, for payment of $57,000 in full settlement of the debtor's federal tax liabilities (R. 23-29, 38). The sum of $57,000 has been paid by the trustee to the District Director and is being held in a suspense account pending the outcome of these proceedings (R. 40). Notice was served upon the Secretary of the Treasury to accept or reject the amended plan (R. 32-33), and on December 26, 1958, the Acting Secretary of the Treasury, Julian A. Baird, filed a notice of rejection of the trustee's plan of reorganization with the clerk of the District Court.

Following the happening of the above-mentioned matters the trustee filed objections to the claims of the United States (R. 13-20), which objections were heard before the referee in bankruptcy who was also designated as a special master. The referee held that the Secretary of the Treasury failed to reject properly the proposed plan of reorganization and therefore was conclusively presumed to have accepted it, and that the claims of the United States were fully satisfied by payment of the $57,000. The referee also held that the trustee was entitled to a credit against the claim of the United States for interest in the amount of $3,863.81 on the $40,000 deposited by the debtor under the offer in compromise. Finally, the referee held that the United States was not entitled to obtain assessed or other pre-petition or post-petition interest or penalties on its secured claims (R. 34-37, 40, 41-45, 46).

Upon a petition for review filed by the United States (R. 4-10, 47-53) the District Court modified the order of the referee and held that the United States had properly rejected the amended plan of reorganization, that the claims of the United States should not be reduced for interest on moneys held by it pursuant to an offer in compromise, and that the United States was entitled to pre-petition interest on the principal of all taxes owed by the debtor. However, the District Court affirmed the order of the referee insofar as it disallowed the recovery of penalties and post-petition interest on the secured claims of the United States (R. 55-57). The United States has appealed to this Court from the disallowance of the portion of its claim for penalties (R. 58, 62-63). The United States of America then appealed to the United States Court of Appeals for the Ninth Circuit, which Court reversed and remanded the order of the District Court (R. 66; Appendix A, *infra*, pp. 13-17). This petition follows.

C. Original Jurisdiction:

Jurisdiction over both cases herein presented was originally vested in the respective District Courts pursuant to the provisions of 11 U.S.C. §§ 1(10), 11(a) and 11(a)(11). Jurisdiction over both cases herein presented was vested in the United States Court of Appeals for the Ninth Circuit pursuant to the provisions of 28 U.S.C. § 1291 and 11 U.S.C. § 47.

REASONS FOR GRANTING WRITS

The following reasons for granting the writs are common to both cases here presented:

1. The decision of the United States Court of Appeals for the Ninth Circuit in these cases, regarding the construction of Section 57(j) of the Bankruptcy Act, 11 U.S.C. § 93, as it affects liened claims of the United States of America for penalties on unpaid taxes, is in direct conflict with the recent decisions of the Fourth and Fifth Circuit Courts of Appeal in *United States v. Harrington,* Fourth Circuit, 1959, 269 F.2d 719; *United States v. Phillips,* Fifth Circuit, 1959, 267 F.2d 374; and with decisions by a number of District Courts including: *In re Burch,* 89 F.Supp. 249 (Kans.); *In re Hankey Baking Co.,* 125 F.Supp. 673 (W.D. Pa.); *In re Lykens Hosiery Mills,* 141 F.Supp. 895 (S.D. N.Y.); and *In re Parchem,* 166 F.Supp. 724 (Minn.). It is believed that the decision of the United States Court of Appeals for the Ninth Circuit in these cases, while being consistent with that Circuit's prior decision of *In re Knox-Powell-Stockton Co.,* 100 F.2d 979, and the decisions from the Sixth and Tenth Circuits in *Commonwealth of Kentucky v. Farmers Bank & Trust Co.,* Sixth Circuit, 1943, 139 F.2d 266; *Grimland v. United States,* Tenth Circuit, 1953, 206 F.2d 599; and *United States v. Mighell,* Tenth Circuit, 1959, 273 F.2d 682, is not only in direct conflict with the cases from the Fourth and Fifth Circuits, cited above, but also in direct conflict with statements from *Gardner v. State of New Jersey,* 329 U.S. 565, 67 S.Ct. 467, 475, 91 L.Ed. 504; and, from *Pepper v. Litton,* 308 U.S. 295, 84 L.Ed. 281, 60 S.Ct. 238.

2. The decision of the United States Court of Appeals for the Ninth Circuit in these cases has far-reach-

ing implications beyond the effect felt by the immediate parties hereto, in that the same question is presented to a great many trustees in bankruptcy in proceedings throughout the United States, and although the United States of America has twice had the opportunity to seek certiorari, following the decisions in *United States v. Harrington, supra,* and *United States v. Phillips, supra,* its failure to do so has placed the burden upon the estates of bankrupts and debtors to seek resolution of this problem.

The following reason for granting the writ in the case of *Simonson v. Granquist* is applicable to that case only:

In *United States v. Gilbert Associates,* 345 U.S. 361, 97 L.Ed. 1071, 73 S.Ct. 701, the question presented was whether or not the Town of Walpole, New Hampshire, occupied the role of a judgment creditor under the provisions of § 3672 of the Internal Revenue Code, 56 Stat. 798, 26 U.S.C. § 3672. In holding that the town was not a judgment creditor for these purposes, the Supreme Court was not construing the provisions of the Bankruptcy Act enacted by Congress for the benefit of trustees in bankruptcy, and these provisions, which control the determination of the first question presented in this case, should now be construed. The need for this determination is evidenced by the concurring opinion of Circuit Judge Hamley in this decision (R. 36-37; Appendix A, *infra,* pp. 16-17), and by the dissenting opinion of Circuit Judge Kalodner, joined in by Judge Hastie, filed in *In re Fidelity Tube Corporation,* Third Circuit, 278 F.2d 776, petition for writ of certiorari pending.

CONCLUSION

We respectfully urge that this Petition for Certiorari be granted as to both cases covered hereby.

Respectfully submitted,

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APPENDIX A

OPINIONS OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt, *Appellant*, vs. R. C. GRANQUIST, District Director of the Internal Revenue Service, *Appellee*.	No. 16,878 Feb. 1, 1961

Upon Appeal from the United States District Court for the District of Oregon

Before: CHAMBERS, HAMLEY and MERRILL, Circuit Judges

PER CURIAM:

This appeal is taken by the trustee of a bankrupt estate from the judgment of the District Court affirming an order of the Referee in Bankruptcy which allowed the United States a lien claim against the bankrupt estate in the sum of $1,442.41 for penalties on unpaid federal taxes.

Two questions are presented by this appeal.

The first question concerns the significance of the fact that although the lien of the United States arose prior to the filing of a petition in bankruptcy, notice of such lien was not filed until after the filing of the petition in bankruptcy. The trustee contends that under § 6323 of the Internal Revenue Code of 1954, 26 U.S.C. § 6323, the lien of the United States under these circumstances is invalid.

Section 6323 provides that the tax lien of the United States "shall not be valid as against a mortgagee, pledgee, purchaser or judgment creditor unless notice thereof has been filed" in certain specified public offices.

Section 70 of the Bankruptcy Act, 11 U.S.C. § 110, provides in part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The trustee contends that under § 70 he is by operation of law made a judgment creditor of the bankrupt; that under § 6323 of the Internal Revenue Code, as a judgment creditor, the lien of the United States is rendered invalid as to him.

The Supreme Court has interpreted § 6323 as limiting the class of persons who take priority over the unrecorded tax liens of the United States to judgment creditors (or purchasers, mortgagees or pledgees) in the conventional and ordinary sense of the words. United States v. Gilbert Associates, 1953, 345 U.S. 361; United States v. Security Trust and Savings Bank, 1950, 340 U.S. 47, 52.

The precise question presented by the instant case was presented to this court in United States v. England, 9 Cir., 1955, 226 F.2d 205. We there held that a trustee in bankruptcy could not, in the light of the Supreme Court's construction of the section, claim the status of judgment creditor under § 6323. Other courts

have reached the same result. In re Fidelity Tube Corporation, 3 Cir., 1960, 278 F.2d 776; Brust v. Sturr, 2 Cir., 1956, 237 F.2d 135; see In re Tailorcraft Aviation Corporation, 6 Cir., 1948, 168 F.2d 808.

We adhere to our ruling in United States v. England and accordingly reject this contention of the trustee.

The second question presented by this appeal is whether a claim of the United States for penalties on unpaid taxes, upon which claim a lien arose prior to bankruptcy, is barred by § 57(j) of the Bankruptcy Act, 11 U.S.C. § 93:

> "Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law."

While the courts have divided upon this question, this court has held that § 57(j) does not apply to secured claims. In re Knox-Powell-Stockton Company, 9 Cir., 1939, 100 F.2d 979. To the same effect are United States v. Mighell, 10 Cir., 1959, 273 F.2d 682; Kentucky v. Farmers Bank, 6 Cir., 1943, 139 F.2d 266. Cases contrary to this court's position are: United States v. Harrington, 4 Cir., 1959, 269 F.2d 719; United States v. Phillips, 5 Cir., 1959, 267 F.2d 374.

We adhere to our ruling in Knox-Powell-Stockton and accordingly reject the contention of the trustee that § 57(j) invalidates the secured claim of the United States in this matter.

Affirmed.

HAMLEY, Circuit Judge (concurring):

Under section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 6323(a), a tax lien of the United States is not valid against a "judgment creditor" until notice thereof has been filed. The notice of the lien here in question was not filed until after the bankrupt's property came into the possession or control of the bankruptcy court. Thus, if the trustee stands in the position of a judgment creditor within the meaning of section 6323, the lien is not valid as to the trustee.

Under section 70(c) of the Bankruptcy Act, 11 U.S.C.A. § 110(c), a trustee in bankruptcy is deemed to be vested as of the date particular property comes into the possession or control of the court, with "all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists." In my view this statute states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one.

As pointed out in the majority opinion, several courts, including this one, have denied the trustee this section 70(c) status. They have done so because in United States v. Gilbert Associates, 345 U.S. 361, 364, it was stated that section 3672(a) of the Internal Revenue Code, 56 Stat. 798, 26 U.S.C.A. (1946 ed.) § 3672 (a), which was similar to section 6323(a) of the Internal Revenue Code of 1954 used the words "judgment creditor" in "the usual conventional sense of a judgment of a court of record, since all states have such courts."

This statement was made in Gilbert Associates in rejecting a contention that a New Hampshire statute which declared a tax assessment to be in the nature of a judgment had the effect of giving city tax liens judg-

ment creditor status under the then section 3672(a). The Supreme Court thus denied to the states and local governments the right to appropriate to themselves by statutory fiat a defense against United States liens which the United States originally intended to be applicable only with respect to ordinary judgment creditors.

But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by act of Congress, the same legislative body was free to extend its benefits however it pleased. I am thus in full agreement with the very exhaustive dissenting opinion of Judge Kalodner, joined in by Judge Hastie, filed in In re Fidelity Tube Corporation, 3 Cir., 278 F.2d 776, petition for writ of certiorari pending.

If the question discussed above were now before this court for the first time I would accordingly vote to reverse. Since, however, this court adopted a contrary view in United States v. England, 9 Cir., 226 F.2d 205, and Congress may, if it chooses, overturn that ruling for the future by enacting clarifying legislation, I am content to note the above views by way of a concurring opinion.

(Endorsed) Per Curiam Opinion and Concurring Opinion Filed Feb. 1, 1961.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. RICHARD D. HARRIS, Trustee for Alaska Telephone Corporation, *Appellee*.	No. 17,066 Feb. 1, 1961

Upon Appeal from the United States District Court for the Western District of Washington Northern Division

Before: CHAMBERS, HAMLEY and MERRILL, Circuit Judges

PER CURIAM:

This appeal involves lien claims in the sum of $7,714.72, asserted by the United States against properties of the Alaska Telephone Corporation, a debtor in reorganization under Chapter X of the Bankruptcy Act. The claim is for penalties imposed on unpaid federal taxes and was disallowed by the Referee in Bankruptcy as in conflict with § 57(j) of the Bankruptcy Act, 11 U.S.C. § 93. Upon review, the ruling of the referee was affirmed by the District Court and the United States has taken this appeal.

The precise point involved was presented to this court in Simonson vs. Granquist, opinion handed down this day, with which case the instant case was consolidated for purposes of argument. For the reasons set forth in that opinion, we hold the rulings of the referee and the District Court to be error.

Reversed and remanded with instructions that the lien claim of the United States be allowed as a secured claim against the properties of the debtor corporation.

(Endorsed) Per Curiam Opinion Filed Feb. 1, 1961.

Frank H. Schmid, Clerk.

APPENDIX B

JUDGMENTS OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HATTIEBELLE O. SIMONSON, ETC., *Appellant*, vs. R. C. GRANQUIST, ETC., *Appellee*.	No. 16878

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered February 1, 1961,

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. RICHARD D. HARRIS, TRUSTEE, ETC., *Appellee*.	No. 17066

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with instructions that the lien claim of the United States be allowed as a secured claim against the properties of the debtor corporation.

(ENDORSED) Judgment

Filed and entered February 1, 1961,

Frank H. Schmid, Clerk.

APPENDIX C

STATUTES INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

Sec. 7. [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840] MEANING OF WORDS AND PHRASES. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *

(10) "Courts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable.

* * * * *

(11 U.S.C. 1952 ed. Sec. 1(10))

Sec. 2 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840] CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * * *

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it

takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid, and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction; * * *

* * * * *

(11 U.S.C. 1952 ed., Sec. 29.)

SEC. 57. PROOF AND ALLOWANCE OF CLAIMS.

* * * * *

j [As amended by Sec. 14(a), Act of July 7, 1952, c. 579, 66 Stat. 420]. Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.

* * * * *

(11 U.S.C. 1952 ed, Sec. 93.)

SEC 64 [As amended by Sec. 1, Act of June 22, 1938, *supra*, and Sec. 19(a), Act of July 7, 1952, *supra*] DEBTS WHICH HAVE PRIORITY.—a. The debt to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceding, * * * (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the

objection and through the efforts and at the cost and expense of one or more creditors, * * * the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States in [*sic*] entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

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(11 U.S.C. 1952, ed., Sec. 104)

SEC. 67 [As amended by Sec. 1, Act of June 22, 1938, *supra,* and Sec. 21(b) and (c), Act of July 7, 1952, *supra*]. LIENS AND FRAUDULENT TRANSFERS.—a. * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of United States or of any State, may be valid against the trustee, even though arising or perfected while the

debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead by perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition initiating a proceeding under this Act, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act; and (2) the provisions of subdivision b of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee: *Provided, however,* That so much of clause (1) of this subdivision c as restricts liens for wages and rent and clause (2) of this subdivision c shall not apply in proceedings under chapter X of this Act, unless an order

shall be entered therein directing that bankruptcy be proceeded with, or in proceedings under section 77 of this Act. The court may on due notice order so much of any lien in excess of the restricted amount under clause (1) and any lien invalid under clause (2) of this subdivision c to be preserved for the benefit of the estate, and, in any such event, such lien for the excess and such invalid lien, as the case may be, shall pass to the trustee.

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(11 U.S.C. 1952 ed., Sec. 107.)

Sec. 70 [As amended by Sec. 23(a) and (c), Act of July 7, 1952, *supra*]. TITLE TO PROPERTY.

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * *

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c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

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(11 U.S.C. 1952 ed., Sec. 110.)

Internal Revenue Code of 1954

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.* In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.* In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.* In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(d) *Disclosure of Amount of Outstanding Lien.* If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

(26 U.S.C. 1958 ed., Sec. 6323.)

Judiciary and Judicial Procedure

Sec. 1254. Courts of appeal; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

(28 U.S.C. 1952 ed. Sec. 1254(1))

Sec. 1291 Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of

Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

June 25, 1948, c. 646, 62 Stat. 929.

(28 U.S.C. 1952 ed. Sec. 1291.)